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Making-Up Conditions Of Employment: The Unequal Burdens Test as a Flawed Mode of Analysis in Jespersen v. Harrah's Operating Co.

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NOTE

MAKING-UP CONDITIONS OF EMPLOYMENT:

THE UNEQUAL BURDENS TEST AS A FLAWED MODE OF ANALYSIS IN *JESPERSEN v. HARRAH'S OPERATING CO.*

INTRODUCTION

Employers may require employees to follow particular appearance and grooming standards as part of an employment agreement.[1] While grooming policies usually require a neat and sometimes uniformed appearance, some may also require employees to alter their identity to a discriminatory extent.[2] Darlene Jespersen, a bartender at Harrah's Casino in Reno, Nevada, faced such a policy when Harrah's imposed a mandatory makeup requirement for all female beverage servers.[3] When Jespersen refused to adhere to the makeup requirement, Harrah's terminated her for failure to comply with the policy.[4]

Title VII protects employees from discriminatory treatment based

[1] *See, e.g.*, Baker v. Cal. Land Title Co., 349 F. Supp. 235, 237 (C.D. Cal. 1972); Fountain v. Safeway Stores, Inc., 555 F.2d 753, 754 (9th Cir. 1977); Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago, 604 F.2d 1028, 1029-30 (7th Cir. 1979); Frank v. United Airlines, Inc., 216 F.3d 845, 847, 854 (9th Cir. 2000); Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1077 n.1 (9th Cir. 2004) [Jespersen II].

[2] *See id.*

[3] *Jespersen II*, 392 F.3d at 1077-78.

[4] *Id.* at 1077.

on "race, color, religion, sex, or national origin."[5] However, the Ninth Circuit excluded certain appearance and grooming policies from Title VII protection in 1974 by holding that employers may impose sex-distinct appearance and grooming policies.[6] In the Ninth Circuit today, appearance and grooming standards fall under Title VII regulation, but face analysis under the unequal burdens test.[7] This test weighs employee burdens imposed by sex-distinct employment policies.[8]

Courts must find that a policy places an unequal burden on one sex for a sex-distinct appearance and grooming policy to be ruled discriminatory under Title VII.[9] In *Jespersen v. Harrah's Operating Co.,* Jespersen challenged the Harrah's makeup requirement as imposing a disparate burden on female employees.[10] She presented evidence such as the psychological impact of the requirement and the effect of the policy on her job performance.[11] Both the district court and the Ninth Circuit Court of Appeals, however, found this was insufficient evidence of an unequal burden to warrant protection under the unequal burdens test.[12]

The unequal burdens test provides employees insufficient protection from discrimination. By including considerations of gender stereotyping as well as the degree of job-relatedness, the Ninth Circuit could provide more sufficient protection for employees. Part I of this Note reviews Title VII and foundational caselaw, including cases regarding sex discrimination and appearance standards.[13] Part II examines the Ninth Circuit's *Jespersen* opinion.[14] Part III compares the Supreme Court decision in *Price Waterhouse v. Hopkins,* which expanded Title VII protection to include gender stereotyping, with the *Jespersen* holding.[15] Part III also explores a Seventh Circuit case, *Carroll v. Talman Federal Savings and Loan Association of Chicago,* and Judge Thomas's dissent in *Jespersen*, which both argue for inclusion of less tangible factors such as gender stereotyping in the unequal burdens test.[16] Part III finally

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[5] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2005).

[6] *Baker,* 507 F.2d at 898.

[7] *Frank,* 216 F.3d at 854-55; *Jespersen II,* 392 F.3d at 1080.

[8] *See Baker,* 507 F.2d at 897; *see also Fountain,* 555 F.2d at 756; *Frank,* 216 F.3d at 854-55; *Jespersen II,* 392 F.3d at 1083.

[9] *Jespersen II,* 392 F.3d at 1081.

[10] *Id.* at 1078-79.

[11] Jespersen v. Harrah's Operating Co., 280 F. Supp.2d 1189, 1193-94 (D. Nev. 2002), *aff'd,* 392 F.3d 1076 (9th Cir. 2004) [Jespersen I].

[12] *See Jespersen I,* 280 F. Supp. 2d at 1190; *Jespersen II,* 392 F.3d at 1083.

[13] *See infra* notes 19 to 74 and accompanying text.

[14] *See infra* notes 75 to 124 and accompanying text.

[15] *See infra* notes 125 to 172 and accompanying text.

[16] *See infra* notes 125 to 172 and accompanying text.

contends that the unequal burdens test should consider a job-relatedness element in the initial weighing of burdens based on the intent of Title VII.[17] Finally, this Note concludes that by incorporating intangible considerations such as gender stereotyping and weighing job-relatedness in the plaintiff's initial showing under the unequal burdens test, the Ninth Circuit will better protect employees from discriminatory appearance and grooming standards.[18]

I. BACKGROUND

Congress implemented the Civil Rights Act of 1964 to protect American citizens from various forms of discrimination.[19] The Act prohibits discrimination based on "race, color, religion, sex, or national origin."[20] Title VII of this Act governs employment discrimination.[21] Ninth Circuit caselaw, however, initially excluded appearance and grooming standards from Title VII protection and later subjected them to a less stringent analysis than other forms of sexual discrimination.[22] The Ninth Circuit's approach provides insufficient protection for employees from discriminatory appearance and grooming policies.

A. TITLE VII

Discriminatory treatment against an individual because of "race, color, religion, sex, or national origin" is an unlawful employment practice under Title VII.[23] There are two classes of Title VII claims that potential plaintiffs can establish: one of disparate impact and one of disparate treatment.[24] Disparate impact claims charge that an employer's practice is facially neutral but its effects fall "more harshly on one group

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[17] *See infra* notes 125 to 172 and accompanying text.

[18] *See infra* notes 173 to 176 and accompanying text.

[19] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

[20] 42 U.S.C. § 2000e-2 (2005).

[21] *Id.*

[22] *See Baker,* 507 F.2d at 897; *see also Fountain,* 555 F.2d at 756; *Frank,* 216 F.3d at 854-55; *Jespersen II,* 392 F.3d at 1083.

[23] 42 U.S.C. § 2000e-2 (2005) ("Employer Practices. It shall be an unlawful employment practice for an employer- 1. to fail or refuse to hire or to discharge any individual, or other wise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or 2. to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.").

[24] *Frank,* 216 F.3d at 853.

than another."[25] A disparate treatment claim challenges an employer's policy as treating some employees less favorably than others based on one of the protected categories: sex, race, color, national origin, or religion.[26]

Title VII sets forth one exception regarding disparate employment policies.[27] Employers may apply distinct policies to different groups if the policy is justified by a "Bona Fide Occupational Qualification" ("BFOQ").[28] The BFOQ exception is extremely limited in scope and authorizes employment decisions to be gender-based if, as a qualification, the distinction is "reasonably necessary to the normal operation" of that particular business.[29] Therefore, if the employer can prove that the disparate treatment is a requirement compelled by reasonable business considerations and related to job skills, then the different standards are justified under Title VII.[30] In all other instances, however, Title VII protects employees from discrimination based on "race, color, religion, sex, or national origin."[31]

B. TITLE VII CASELAW AND THE NINTH CIRCUIT'S APPROACH

In evaluating Title VII sex discrimination claims, Ninth Circuit caselaw distinguishes between discrimination regarding immutable and mutable characteristics.[32] Discrimination based on "'immutable characteristics' of race, national origin, color, or sex"[33] are evaluated

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[25] *Id.* (referring to a policy that does not distinguish or differentiate between groups in the explicit terms or language of the regulation or standard).

[26] *Id.* ("Disparate treatment is permissible under Title VII only if justified as a bona fide occupational qualification ('BFOQ'). A BFOQ is a qualification that is reasonably necessary to the normal operation or essence of an employer's business.").

[27] 42 U.S.C. § 2000e-2 (2005).

[28] *Id.* ("Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin . . . . Notwithstanding any other provision of this title [42 U.S.C. §§ 2000e, et seq.], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .").

[29] *Frank*, 216 F.3d at 855.

[30] *Id.* ("It is true that not all sex-differentiated appearance standards constitute disparate treatment that must be justified under Title VII as BFOQs. An appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment. A sex-differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment that must be justified as BFOQ.").

[31] 42 U.S.C. § 2000e-2 (2005).

[32] *Baker*, 507 F.2d at 897.

[33] *Id.*

under the traditional *McDonnell Douglas* formulation.[34] By contrast, mutable characteristics include those traits that an employee has the power to change such as hair length, appearance, and grooming.[35] Notably, the Ninth Circuit's evaluation of discriminatory conduct is more lenient regarding mutable characteristics.[36]

1. McDonnell Douglas Corp. v. Green

To prevail under a claim for disparate treatment based on sex, the employee first needs to establish a prima facie case of discrimination based on the factors formulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of [racial] discrimination. This may be done by showing (i) that he belongs to a [protected] minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[37]

Once the employee demonstrates these elements, the burden shifts to the employer to produce some "legitimate, nondiscriminatory reason" for the treatment.[38] If the employer presents such a reason, the employee has an opportunity to prove that the employer's justification is pretextual, and that the true reason for the adverse action was based on discrimination prohibited by Title VII.[39] The *McDonnell Douglas* analysis protects employees because it permits a plaintiff to prove the elements of the claim and provides the plaintiff with an opportunity to challenge a potentially pretextual reason for the discriminatory action.[40]

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[34] Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 608 (9th Cir. 1982).

[35] *Jespersen II,* 392 F.3d at 1080 ("Because grooming and dress standards regulated 'mutable' characteristics such as hair length, we reasoned, employers that made compliance with such standards a condition of employment discriminated on the basis of their employees' appearance, not their sex.").

[36] *Id.*

[37] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[38] *Gerdom,* 692 F.2d at 608.

[39] *Id.* (meaning a false justification used to cover up the employer's alleged prejudicial treatment).

[40] *See id.*

2. Price Waterhouse v. Hopkins

In 1989, the U.S. Supreme Court extended Title VII protection for sex discrimination claims by ruling that gender stereotyping may not play a role in employment decisions.[41] In *Price Waterhouse v. Hopkins*, the plaintiff alleged sex discrimination against Price Waterhouse for denying her partnership at the accounting firm.[42] The Price Waterhouse Policy Board's[43] ("Policy Board") reasons for the denial were characteristics including aggressiveness and "overcompensat[ing] for being a woman."[44] The Policy Board member who informed the plaintiff of the firm's decision advised her to "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry."[45] The Court ruled in the plaintiff's favor, finding that the Policy Board wrongly considered evaluations "motivated by stereotypical notions about women's proper deportment."[46] Similar to discrimination based on race or religion, the Court stated that gender must not play any role in employment determinations.[47]

3. *Ninth Circuit Caselaw*

The Ninth Circuit continually treats appearance and grooming

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[41] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superceded by statute,* Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(B)(ii)(3)(m) (2005).

[42] *Id.* at 232.

[43] *Id.* at 232-33 ("At Price Waterhouse . . . a senior manager becomes a candidate for partnership when the partners in her local office submit her name as a candidate. All of the other partners in the firm are then invited to submit written comments on each candidate . . . . [T]he firm's Admissions Committee makes a recommendation to the Policy Board. The Policy Board then decides whether to submit the candidate's name to the entire partnership for a vote, to 'hold' her candidacy, or to reject her. The recommendation of the Admissions Committee, and the decision of the Policy Board, are not controlled by fixed guidelines: a certain number of positive comments from partners will not guarantee a candidate's admission to the partnership, nor will a specific quantity of negative comments necessarily defeat her application.").

[44] *Id.*

[45] *Id.*

[46] *Id.* at 256, 258. Looking to the intent behind the passage of Title VII the Court stated, "[a]s for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Id.* The Court read the language of Title VII to say "gender must be irrelevant to employment decisions." *Id.* Price Waterhouse denied the plaintiff partnership because she did not fit the employer's expectation of how a woman should act. *Id.* This decision took considerations of sex and gender into account. *Id.* According to the Supreme Court, such a determination, made with considerations of gender, is discriminatory under Title VII. *Id.*

[47] *Id.* at 243.

policies differently from other employment policies regulated by Title VII.[48] In *Baker,* the Ninth Circuit carved out an exception to Title VII, holding that employers can impose sex-distinct appearance and grooming policies without violating Title VII.[49] The plaintiff in *Baker* had challenged a grooming policy that tolerated long hair for female employees but prohibited male employees from having long hair.[50] The Ninth Circuit held that Congress did not intend Title VII to define 'sex' as broadly as to allow challenges to an employer's regulations regarding appearance or grooming.[51] Therefore, the employer permissibly terminated the plaintiff because he did not comply with his employer's short-hair requirement, not because he was a male.[52] The Ninth Circuit's holding in *Baker* excluded appearance and grooming standards from the scope of Title VII discrimination actions based on the rationale that it constituted discrimination based on appearance, a mutable characteristic, instead of the immutable characteristic of sex.[53]

In *Fountain v. Safeway Stores, Inc.*, the Ninth Circuit expanded the *Baker* holding by stating that employers have discretion, but are not required, to change employment policies in response to employee protest.[54] In *Fountain,* the employer altered the female dress code to allow women to wear pants after a protest by the female employees.[55] Similarly, the employer altered the hair length requirement to allow male employees to wear longer hairstyles.[56] However, the employer refused to alter a policy requiring male employees to wear ties.[57] The court held that the employer's distinct requirement that only male employees wear ties was justified by the employer's authority to create sex-distinct

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[48] *See, e.g., Baker,* 349 F. Supp. at 237; *Fountain,* 555 F.2d at 754; *Frank,* 216 F.3d at 847, 854; *Jespersen* II, 392 F.3d at 1077 n.1.

[49] *Baker,* 507 F.2d at 898.

[50] *Id.* at 896.

[51] *Id.* ("We agree with the district court that a private employer may require male employees to adhere to different modes of dress and grooming than those required of female employees and such does not constitute an unfair employment practice within the meaning of 42 U.S.C. §2000e-2(a).").

[52] *Id.* at 897-98 (referring to a 1971 United States Supreme Court case involving a Title VII challenge, the court further explained, "[o]bviously, it seems to us, the [Supreme] Court was not talking in terms of hair styles or modes of dress over which the job applicant has complete control. The Court was addressing itself to characteristics which the applicant, otherwise qualified, had no power to alter.").

[53] *Id.* at 898 ("The character of appellant's sex does not seem to have been a deterrent to his qualifications or he would not have obtained the job in the first place. It was his violation of the company grooming standards . . . which appears to have caused his termination, not his sex.").

[54] *Fountain,* 555 F.2d at 756.

[55] *Id.* at 755.

[56] *Id.*

[57] *Id.*

regulations.[58] Moreover, the Ninth Circuit underscored the importance of employer discretion in composing a professional public image.[59] Accordingly, under *Fountain* employers not only have the power to make sex-distinct appearance and grooming standards, they have the right to make discretionary changes to those standards.[60]

4. Frank v. United Airlines, Inc. *and the Unequal Burdens Test*

In *Frank v. United Airlines, Inc.,* the Ninth Circuit narrowed Title VII's appearance and grooming standard exception by stating that different appearance standards are permissible under Title VII if they impose equal burdens.[61] Between 1980 and 1994, United Airlines ("United") maintained distinct weight requirements for male and female flight attendants.[62] For women, United based the standard on maximum weights for a *medium* female body frame.[63] In contrast, United set the maximum weight requirement using a *large* male body frame.[64] This difference meant that female flight attendants had to weigh fourteen to twenty-five pounds less than male flight attendants of the same height and age.[65] After United disciplined or terminated several flight attendants who did not maintain the required weight limit, thirteen plaintiffs brought a class action suit against United alleging discrimination under Title VII.[66] The Ninth Circuit held the weight requirements were facially discriminatory because they directly imposed disparate standards for men and women.[67] The distinct disparate

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[58] *Id.*

[59] *Id.* at 755-56 ("[I]t follows that [employers] should be able to amend its regulations when they no longer reflect management's judgment regarding desirable dress and grooming standards. Likewise, an employer may enforce those regulations that it believes its particular business requires . . . power to amend regulations for one sex independent of any action with respect to the regulations for the other sex flows directly from the employer's power to promulgate separate regulations in the first place.").

[60] *Id.* at 756; *see Baker,* 507 F.2d at 898.

[61] *See Frank,* 216 F.3d at 848, 854-55.

[62] *Id.* at 848. United imposed the employment policy using a Metropolitan Life Insurance Company publication, which set forth desirable weights and heights of males and females. *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* ("For example, the maximum weight for a 5'7", 30-year-old woman was 142 pounds, while a man of the same height and age could weigh up to 161 pounds. A 5'11", 50-year-old woman could weigh up to 162 pounds, while the limit for a man of the same height and age was 185 pounds.").

[66] *Id.*

[67] *Id.* at 847 ("The uncontroverted evidence shows that United chose weight maximums for women that generally corresponded to the medium frame category of MetLife's Height and Weight Tables. By contrast, the maximums for men generally corresponded to MetLife's large frame

measurements apparent on the face of the policy triggered Title VII protection.[68]

Though United sought to defend the policy as an appearance and grooming standard outside of Title VII purview, the court's holding alluded to what would eventually become known as the unequal burdens test.[69] The court held:

> It is true that not all sex-differentiated appearance standards constitute disparate treatment that must be justified under Title VII as BFOQs. An appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment . . . "regulations promulgated by employers which require male employees to conform to different grooming and dress standards than female employees is not sex discrimination within the meaning of Title VII."[70]

Therefore, under *Frank*, different appearance and grooming standards are permissible under Title VII if they impose equal burdens on the employees.[71] Conversely, if the appearance and grooming standards impose an unequal burden, then the employer must show that the disparate treatment is justified by a BFOQ.[72] Employers maintain the ability to impose sex-distinct appearance and grooming standards, if those standards do not impose an unequal burden.[73]

Although the Ninth Circuit initially excluded appearance and grooming standards from Title VII purview, in *Frank* the court modified its original approach by considering the relative burdens placed on employees by sex-distinct employment policies.[74]

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category . . . . Because of this consistent difference in treatment of women and men, we conclude that United's weight policy between 1980 and 1994 was facially discriminatory.") The court based its determination in large part on a previous Ninth Circuit airline case, which stated, "[w]here a claim of discriminatory treatment is based upon a policy which on its face applies less favorably to one gender . . . a plaintiff need not otherwise establish the presence of discriminatory intent." *Id.*, (citing *Gerdom*, 692 F.2d at 608).

[68] *Id.* at 854.

[69] *Id.* at 854-55.

[70] *Id.* (citing *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753 (9th Cir. 1977)).

[71] *Id.* ("Even if United's weight rules constituted an appearance standard, they would still be invalid. A sex-differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment that must be justified as a BFOQ . . . United may not impose different *and more burdensome* weight standards without justifying those standards as BFOQs.") (emphasis in original).

[72] *Id.*

[73] *Id.* at 854-55.

[74] *Baker*, 507 F.2d at 897; *Frank*, 216 F.3d at 854-55.

II. *JESPERSEN V. HARRAH'S OPERATING CO.*

In *Jespersen*, the Ninth Circuit considered whether a mandatory makeup requirement for female beverage servers was a discriminatory appearance and grooming standard under Title VII.[75]

A. FACTS AND PROCEDURAL HISTORY

In 2000, Harrah's Operating Company, ("Harrah's"), "the world's premier provider of branded casino entertainment,"[76] implemented the Beverage Department Image Transformation ("BDIT"), which emphasized guest service and imposed detailed appearance standards on all guest service employees.[77] Through this program, Harrah's hoped to create a brand standard of excellence throughout its establishments, starting with the visual presentation of all guest service employees.[78] The BDIT included the Personal Best Image Program ("PBIP"), a new appearance and grooming policy for Harrah's employees.[79] In addition to sex-neutral appearance provisions, the PBIP outlined sex-specific standards for male and female beverage servers.[80] The policy required female employees to wear their hair "teased, curled, or styled," nail polish of particular colors, and stockings of a natural color matching the

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[75] *Jespersen II*, 392 F.3d at 1081-83.

[76] *Harrah's.com: About Us – Index*, http://investor.harrahs.com/ (last visited Feb. 26, 2006) ("Founded in 1937, Harrah's Entertainment owns or manages through various subsidiaries more than forty casinos in three countries, primarily under the Harrah's, Caesars and Horseshoe brand names.").

[77] *Jespersen II*, 392 F.3d at 1077 ("In February 2000, Harrah's implemented its 'Beverage Department Image Transformation' program at twenty Harrah's locations, including its casino in Reno.").

[78] *Id.*

[79] *Id.* at 1077-78 ("Harrah's required each beverage service employee to attend 'Personal Best Image Training' prior to his or her final uniform fitting . . . 'Personal Best Image Facilitators' instructed Harrah's employees on how to adhere to the standards of the program . . . . At the conclusion of the training, two photographs (one portrait and one full body) were taken of the employee looking his or her 'Personal Best' . . . . [S]upervisors used the 'Personal Best' photographs as an 'appearance measurement' tool, holding each employee accountable to look his or her 'Personal Best' on a daily basis.").

[80] *Id.* at 1077 n.1 ("Overall Guidelines (applied equally to male/female): Appearance: Must maintain Personal Best Image; Jewelry, if issued, must be worn . . . Otherwise, tasteful and simple jewelry permitted; no faddish hairstyles or unnatural colors are permitted. Males: Hair must not extend below top of shirt collar. Ponytails are prohibited. Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted. Eye and facial makeup is not permitted. Females: Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions. Stockings are to be of nude or natural color consistent with employee's skin tone. No runs. Nail polish can be clear, white, pink, or red color only. No exotic nail art or length.").

employee's skin tone.[81] The provisions for male beverage servers prohibited "makeup or colored nail polish" and required male beverage servers to "maintain short haircuts and trimmed nails."[82] Shortly after implementation, Harrah's amended the standards to include a mandatory makeup requirement for all female beverage servers.[83]

Darlene Jespersen worked as a bartender at Harrah's for almost twenty years prior to implementation of the PBIP.[84] She maintained a high customer satisfaction rating and Harrah's considered her an outstanding employee.[85] Jespersen participated in PBIP and BDIT training programs but found that she could not successfully perform her job wearing a full face of makeup.[86] Specifically, she felt that wearing makeup interfered with her ability to interact with customers and diminished her credibility as an experienced bartender.[87] Accordingly, Jespersen refused to comply with the mandatory makeup provision.[88] Because of her refusal, Harrah's informed Jespersen of available alternative employee positions which would not require compliance with the makeup requirement.[89] Jespersen did not apply for these positions and continued to ignore the makeup requirement.[90] Harrah's terminated her for failure to comply with the mandatory BDIT and PBIP standards.[91] Jespersen brought a Title VII suit against Harrah's claiming that the BDIT/PBIP makeup requirement for female beverage servers constituted disparate treatment under Title VII and discriminated against Jespersen because of her sex.[92]

Upon a motion by the defendant, the United States District Court for the District of Nevada granted summary judgment for Harrah's.[93] The

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[81] *Id.* at 1077.

[82] *Id.*

[83] *Id.* at 1077-78 ("The amended policy required that '[m]akeup (foundation/concealer and/or face powder, as well as blush and mascara) must be worn and applied neatly in complimentary colors,' and that '[l]ip color must be worn at all times.'").

[84] *Id.* at 1077.

[85] *Id.* ("Over the years, Jespersen's supervisors commented that she was 'highly effective,' that her attitude was 'very positive,' and that she made a 'positive impression' on Harrah's guests. Harrah's customers repeatedly praised Jespersen on employee feedback forms, writing that Jespersen's excellent service and good bar attitude enhanced their experience at the sports bar and encouraged them to come back.").

[86] *Id.*

[87] *Id.*

[88] *Id.* at 1077-78.

[89] *Jespersen I*, 280 F. Supp. 2d at 1190.

[90] *Id.*

[91] *Jespersen II*, 392 F.3d at 1077.

[92] *Id.* at 1078.

[93] *Jespersen I*, 280 F. Supp. 2d at 1190.

court found that the BDIT/PBIP policies did not violate Title VII because there was no discrimination against Jespersen based on immutable characteristics associated with sex.[94] The district court evaluated Jespersen's claim under the unequal burdens test and found that the BDIT/PBIP appearance policies imposed equal burdens based on mutable characteristics on both sexes, thereby leaving no question of fact for a jury to consider.[95] Jespersen appealed the grant of summary judgment to the United States Court of Appeals for the Ninth Circuit.[96]

B. THE NINTH CIRCUIT'S ANALYSIS

Of the three-judge appellate panel, Judge Wallace Tashima and Judge Barry Silverman affirmed the district court's grant of summary judgment for Harrah's.[97] Judge Sidney Thomas dissented, arguing that Jespersen had raised a triable issue of fact.[98]

1. The Majority Opinion

On appeal, the Ninth Circuit applied the unequal burdens test to evaluate Jespersen's discrimination claim against Harrah's.[99] The court reviewed previous decisions from *Baker* and *Fountain*, which held that "grooming and appearance standards that apply differently to women and men do not constitute discrimination on the basis of sex."[100] The court then discussed *Frank* where the Ninth Circuit limited the appearance and grooming exception holding, "[a]lthough employers are free to adopt

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[94] *Id.* at 1192. The court noted that because the makeup requirement involves a mutable characteristic, it did not burden opportunities for employment based on sex. *Id.* The court reaffirmed that different but equal appearance and grooming practices based on mutable characteristics are not within Title VII control. *Id.*

[95] *Id.* at 1193 ("[P]rohibiting men from wearing makeup may be just as objectionable to some men as forcing women to wear makeup is to Plaintiff . . . . Because a fair reading of the policy indicates that it is applied 'evenhandedly to employees of both sexes,' . . . we conclude that this situation is more like the sex-differentiated standards that impose equal but different burdens on both sexes, than that discussed in *Frank* which imposed a different and heavier burden on women." (citation omitted)).

[96] *Jespersen II*, 392 F.3d at 1077.

[97] *Id.*

[98] *Id.* at 1087 (Thomas, J., dissenting).

[99] *Id.* at 1083 (Thomas, J., dissenting).

[100] *Id.* at 1080 ("In *Baker v. Cal. Land Title Co.*, . . . we concluded that grooming and dress standards were entirely outside the purview of Title VII because Congress intended that Title VII only prohibit discrimination based on 'immutable characteristics' associated with a worker's sex. Because grooming and dress standards regulated 'mutable' characteristics such as hair length, we reasoned, employers that made compliance with such standards a condition of employment discriminated on the basis of their employees' appearance, not their sex.").

different appearance standards for each sex, they may not adopt standards that impose a greater burden on one sex than the other."[101] However, the Ninth Circuit had difficulty defining the precise terms of the test.[102] The court noted:

> [b]ecause the question is not presented on this record, we do not need to define the exact parameters of the "unequal burdens" test, as applied to personal appearance and grooming. We do note, however, that this is not an exact science yielding results with mathematical certainty. We further note that any "burden" to be measured under the "unequal burdens" test is only that burden which is imposed beyond the requirements of generally accepted good grooming standards.[103]

Noting factors such as "cost and time necessary" to comply with the policy in question, the court stated it would evaluate the "actual impact" a requirement has on both male and female employees.[104] This evaluation compares the weight of the alleged discriminatory provision of one sex against the weight of the entire policy for the other sex.[105] Therefore, the court contrasted the burden of the makeup requirement with the relative burden of the entire male appearance policy.[106]

Jespersen argued that gender stereotyping and other intangible burdens inherent in Harrah's makeup requirement imposed a disparate burden on women and therefore constituted a discriminatory appearance and grooming standard.[107] Jespersen also focused on how the requirement substantially affected her performance as a bartender.[108] She

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[101] *Id.* (9th Cir. 2004) (emphasis in original) (citing *Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000)).

[102] *Id.* at 1081.

[103] *Id.* at 1081 n.4.

[104] *Id.* at 1081.

[105] *Id.* Harrah's argued that the alleged makeup requirement burden be compared to the male grooming requirements as a whole. *Id.* On the other hand, Jespersen argued the makeup requirement should only be compared to the makeup prohibition for the men. *Id.* The Ninth Circuit agreed with Harrah's that the burden of the makeup requirement should be compared to the burdens of male appearance policy as a whole. *Id.*

[106] *Id.*

[107] *Jespersen I*, 280 F. Supp.2d at 1193-94 ("We are mindful that the true gravamen of Plaintiff's complaint appears to be that it is discriminatory to force a woman to wear makeup because she feels it is exploitive and perpetuates women's roles as sex objects. Plaintiff believes Defendant's policy negatively impacts women by portraying them in this stereotypical manner. She argues that Defendant should not treat women like 'Barbie' dolls.").

[108] *Jespersen II*, 392 F.3d at 1077 ("Although Jespersen never cared for makeup, she tried wearing it for a short period of time in the 1980s. But she found that wearing makeup made her feel sick, degraded, exposed and violated. Jespersen felt that wearing makeup 'forced her to be feminine' and to become 'dolled up' like a sexual object, and that wearing makeup actually interfered with her ability to be an effective bartender (which sometimes required her to deal with

further argued that the customers' perception of her as a Harrah's employee changed when she wore makeup.[109]

However, the Ninth Circuit did not view these intangible burdens as persuasive evidence of discriminatory treatment.[110] The court explained that according to its analysis under the unequal burdens test, Jespersen did not present sufficient evidence of a disparate burden to present a jury question.[111] Instead, the court returned to the *Baker* approach, which allows sex-distinct appearance policies, and challenged Jespersen's lack of evidence regarding the disparate time and expense involved in complying with the appearance policy.[112] The Ninth Circuit found that without concrete evidence of a disparate burden, such as receipts showing the cost of makeup supplies and documentation of the additional time required to maintain a made-up look throughout the work shift, there was no question of fact for a jury to decide.[113] Therefore, the Ninth Circuit concluded that she failed to prove that the BDIT/PBIP imposed an unequal burden on women.[114] The court accordingly affirmed the district court's decision of summary judgment in favor of Harrah's.[115]

2. *The Dissent*

In the dissent, Judge Thomas argued that while disparate quantitative burdens such as expense are important considerations under a Title VII appearance standards analysis, the analysis should include

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unruly, intoxicated guests) because it 'took away [her] credibility as an individual and as a person.'"); *see also id.* at 1086 (Thomas, J., dissenting) ("Jespersen testified very compellingly to the burdens she personally felt in complying with the makeup policy, explaining that it required to conform with a feminine stereotype that she felt had nothing to do with making drinks. Given her stellar customer and supervisor evaluations, Jespersen is obviously not alone in this analysis.").

[109] *Id.* at 1081.

[110] *Id.*

[111] *Id.* at 1083.

[112] *Id.* at 1081 ("Jespersen cites to academic literature discussing the cost and time burdens of cosmetics generally, but she presents no evidence as to the cost or time burdens that must be borne by female bartenders in order to comply with the makeup requirement . . . . Because there is no evidence in the record from which we can assess the burdens that the 'Personal Best' policy imposes on male bartenders either, Jespersen's claim fails for that reason alone.").

[113] *Id.*

[114] *Id.*

[115] *Id.* at 1083. The court granted a rehearing *en banc* on May 13, 2005. *See* Jespersen v. Harrah's Operating Co., 409 F.3d 1061 (9th Cir. 2005). Oral arguments were held on June 22, 2005. The *en banc* court affirmed the three-judge panel decision that Jespersen failed to create a triable issue of fact. *See United States Court of Appeals for the Ninth Circuit; Ninth Circuit Opinions*, http://www.ca9.uscourts.gov (last visited April 15, 2006). This Note went to print prior to the publishing of the *en banc* decision.

other factors.[116] Judge Thomas was particularly troubled that the grooming policy conformed to traditional notions of what a female is "supposed" to look like.[117] Judge Thomas stated:

> the majority neglects burdens other than time and money that are imposed by the policy. The sex-stereotyping inherent in certain appearance standards is a burden that falls more heavily on one sex than the other. Thus, we have recognized that the unequal burdens test does not permit sex-differentiated appearance standards that denigrate one gender based on sex stereotypes.[118]

While "[not] all gender-differentiated appearance requirements are prohibited[,]" Judge Thomas noted that, "what violates Title VII are those that rest upon a message of gender subordination."[119]

Citing *Carroll v. Talman Federal Savings and Loan Association of Chicago*, Judge Thomas explained that the makeup requirement imposed solely on women beverage servers creates a "natural tendency to assume that the . . . women have a lesser professional status."[120] In *Carroll*, the Seventh Circuit held that single-sex uniform policy imposed negative assumptions and demeaning stereotypes upon the women that had to conform to the policy.[121] Similarly in *Jespersen,* the makeup requirement required female employees to "costume" themselves in gender.[122] It created a visible distinction between male and female beverage servers based on traditional gender stereotypes.[123] According to Judge Thomas, if the court considered intangible factors such as gender stereotyping in the unequal burdens test, Harrah's motion for summary judgment would fail.[124]

III. DISCUSSION

Employment policies such as Harrah's BDIT/PBIP standards that require individuals to conform to outdated sex stereotypes are

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[116] *Jespersen II,* 392 F.3d at 1085-86 (Thomas, J., dissenting).

[117] *Id.* at 1086 (Thomas, J., dissenting). ("This is not to say that all gender-differentiated appearance requirements are prohibited; what violates Title VII are those that rest upon a message of gender subordination. The distinction is apparent in the history of our caselaw on grooming and appearance standards under Title VII.").

[118] *Id.* (Thomas, J., dissenting).

[119] *Id.* (Thomas, J., dissenting).

[120] *Carroll,* 604 F.2d at 1032-33.

[121] *Jespersen II,* 392 F.3d at 1086 (Thomas, J., dissenting).

[122] *Id.* (Thomas, J., dissenting).

[123] *Id.* (Thomas, J., dissenting).

[124] *Id.* (Thomas, J., dissenting).

discriminatory and limit employment opportunities.[125] The unequal burdens test fails to detect significant discriminatory elements of appearance and grooming policies. It sidesteps Title VII caselaw from both the Ninth Circuit and the U.S. Supreme Court that protects employees from discrimination based on gender stereotyping.[126] The Supreme Court's decision in *Price Waterhouse*[127] is an example how including intangible considerations such as gender stereotyping would provide for greater protection for employees.[128] The Seventh Circuit case of *Carroll*, discussed in Judge Thomas's *Jespersen* dissent also reveals the inadequacies of the current unequal burdens test.[129] Additionally, incorporating a job-relatedness component in the initial evaluation of burdens would create a more effective analysis of appearance and grooming policies under Title VII.

A. MORE SIMILAR THAN DIFFERENT: APPLYING THE *PRICE WATERHOUSE* TEST TO *JESPERSEN*

In *Jespersen,* the Ninth Circuit should have incorporated considerations of gender stereotyping in the unequal burdens analysis based on the U.S. Supreme Court decision in *Price Waterhouse.* In *Price Waterhouse,* the Court held that like sex, gender stereotyping was an unacceptable consideration in employment discrimination.[130] Jespersen argued that *Price Waterhouse* applied to her discrimination claim.[131] However, the Ninth Circuit rejected this argument, holding that *Price Waterhouse* "did not address the specific question of whether an employer can impose sex-differentiated appearance and grooming standards on its male and female employees."[132] Therefore, since *Price Waterhouse* did not specifically address appearance and grooming standards, the gender stereotyping principles did not apply to Jespersen's claim.[133]

By neglecting to apply *Price Waterhouse,* the *Jespersen* court distinguished between an employer that imposes stereotype-based

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[125] *See* Brief of Amici Curiae the National Center for Lesbian Rights and the Transgender Law Center in Support of Plaintiff Appellant, *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076 (9th Cir. 2004) (No. 03-15045), 2005 WL 1501598.

[126] *Jespersen II,* 392 F.3d at 1084-86 (Thomas, J., dissenting).

[127] *Price Waterhouse*, 490 U.S. at 258.

[128] *See Jespersen II,* 392 F.3d at 1083-86 (Thomas, J., dissenting).

[129] *See id.* (Thomas, J., dissenting).

[130] *Price Waterhouse,* 490 U.S. at 258.

[131] *Jespersen II,* 392 F.3d at 1082.

[132] *Id.*

[133] *Id.*

appearance standards and an employer that uses gender stereotypes to influence employment decisions.[134] This distinction means that a case's outcome would turn on whether the company actually instituted a grooming policy based on gender stereotypes or used considerations of gender stereotyping in making employment decisions. In *Price Waterhouse,* the Supreme Court focused particular attention on a partner's comment advising the plaintiff to "dress more femininely, wear makeup, have her hair styled, and wear jewelry."[135] The Court used this language to show how discriminatory considerations played a role in determining the plaintiff's eligibility for partner.[136] From the Ninth Circuit ruling in *Jespersen*, however, it seems to follow that if Price Waterhouse instituted an appearance and grooming policy that required women to wear lipstick, while prohibiting men from doing the same, the appearance policy would have been valid under Title VII and the unequal burdens test.[137] According to *Price Waterhouse*, allowing gender stereotypes to influence employment decisions is discriminatory.[138] Based on *Jespersen*, however, the formal imposition of such stereotypes through employee grooming policies is not discriminatory unless there is some unequal burden.[139] The unequal burdens test thus provides employees insufficient protection from discrimination based on gender stereotypes.

Courts should especially be critical of such appearance and grooming policies that mandate superficial conformity to outdated stereotypes of what is "male" or "female." By allowing an exception in grooming standards, the *Jespersen* court permitted employers to make employment policies demanding the exact stereotypes the Ninth Circuit ruled as discriminatory harassment and the U.S. Supreme Court ruled as encroaching on Title VII.[140] The Ninth Circuit should incorporate intangible considerations such as gender stereotyping in the unequal burdens analysis. This would provide more protection for employees from discriminatory appearance and grooming policies.

B. BOLSTERING THE UNEQUAL BURDENS TEST

Like the U.S. Supreme Court in *Price Waterhouse*, the Ninth Circuit

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[134] *Id.*

[135] *Price Waterhouse,* 490 U.S. at 235.

[136] *Id.*

[137] *See Jespersen II,* 392 F.3d at 1082.

[138] *Price Waterhouse,* 490 U.S. at 258.

[139] *Jespersen II,* 392 F.3d at 1082.

[140] *Id.; see Price Waterhouse,* 490 U.S. at 258.

should include considerations of gender stereotyping in the unequal burdens test. In *Frank v. United Airlines*, the Ninth Circuit signaled a departure from traditional evaluations of grooming standards.[141] The sex distinct weight requirements were facially discriminatory, but the policy also imposed unequal intangible burdens.[142] The weight requirements were found to be more burdensome on women, not because of any economic consideration of time or cost, but because of the intangible burden that adhering to such requirements placed on female flight attendants.[143] In *Jespersen*, however, the Ninth Circuit disregarded the precedent in *Frank* and *Price Waterhouse* by focusing on evidence of economic effects as proof of unequal burdens in a disparate treatment claim.[144] While considerations of cost and time are significant factors in evaluating disparate treatment, courts must consider the less tangible effects of such policies. More so than money or time, employment policies that subject employees to gender stereotyping are discriminatory under Title VII.

While refusing to rely on *Price Waterhouse* in *Jespersen,* the Ninth Circuit has extended Title VII protection based on gender stereotyping to a sexual harassment claim.[145] In *Nichols v. Azteca Restaurant Enterprises, Inc.* the plaintiff sued the employer for harassment based on the plaintiff's non-conformity to gender-based stereotypes.[146] The Ninth Circuit, citing *Price Waterhouse*, granted the plaintiff relief due to harassment and discrimination based on sex stereotypes.[147] The court stated, "*Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes . . . . That rule squarely applies to preclude the harassment here."[148] The Ninth Circuit, later noted, however, that

> [w]e do not imply that all gender-based distinctions are actionable under Title VII. For example, our decision does not imply that there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and

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[141] *Frank*, 216 F.3d at 855.

[142] *Id.*

[143] *Id.*

[144] *Jespersen II*, 392 F.3d at 1081.

[145] Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 875 (9th Cir. 2001).

[146] *Id.* at 874-75 ("At its essence, the systematic abuse directed at [plaintiff] Sanchez reflected a belief that Sanchez did not act as a man should act. Sanchez was attacked for walking and carrying his tray 'like a woman' – i.e., for having feminine mannerisms . . . . We conclude that this verbal abuse was closely linked to gender.").

[147] *Id.*

[148] *Id.* at 874.

grooming standards.[149]

A case for sexual harassment is different from a grooming standards challenge; however, the Ninth Circuit used *Price Waterhouse* to protect the plaintiff in *Nichols* from harassment based on gender stereotypes.[150] The court left room for a flexible interpretation by stating that "reasonable regulations" may not be affected by *Price Waterhouse*.[151] Appearance and grooming policies based on traditional gender stereotypes and lacking any relation to an employee's job responsibilities are not reasonable. By incorporating *Price Waterhouse* in evaluating appearance and grooming standards, the court would better protect employees from discriminatory policies.

Based on the Ninth Circuit's evaluation in *Nichols* and the Seventh Circuit's decision in *Carroll*, gender stereotyping is a significant consideration in evaluating discrimination claims under Title VII. Because the Ninth Circuit applied *Price Waterhouse* to the harassment claim in *Nichols*[152], it should incorporate those same considerations of gender stereotyping to appearance and grooming policies. The Ninth Circuit's unequal burdens test ignores the significant concern of the intangible effect appearance and grooming policies have on the employee and his or her ability to perform.[153] Policies that generate sex-distinct perceptions of employees performing the same jobs are equally as discriminatory as policies that impose different quantitative burdens.

C. INCORPORATING JOB-RELATEDNESS INTO THE UNEQUAL BURDENS TEST

The Ninth Circuit must also consider the relationship between an appearance and grooming standard and the actual occupational role of the employee. Under the unequal burdens test, an employer procedurally does not present the narrow Bona Fide Occupational Qualification defense or a rationale for the grooming policy until after a plaintiff proves that a disparate burden exists.[154] Discussion of any job-relatedness component of the policy is thus postponed in the evaluation.[155] In many instances, this is too late for the job-relatedness

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[149] *Id.* at 874-75 n.7.

[150] *Id.* at 874-75.

[151] *Id.* at 874-75 n.7.

[152] *Id.* at 874-75.

[153] *Jespersen II*, 392 F.3d at 1086 (Thomas, J., dissenting).

[154] *Frank*, 216 F.3d at 854-55.

[155] *Id.* at 855 ("It is true that not all sex-differentiated appearance standards constitute

consideration to take place. Where, like *Jespersen,* there is little concrete evidence of a disparate burden, evaluating the lack of relationship between the policy and the occupation would help a plaintiff meet the initial burden of the unequal burdens test. Additionally, job-relatedness is a critical consideration in determining the arbitrary or discriminatory quality of a policy.

If courts allow employers to have discretion in creating sex-distinct appearance and grooming policies, courts must also address the job-relatedness element earlier in the analysis. In *Fernandez v. Wynn*, the plaintiff alleged sex discrimination in violation of Title VII based on the employer's refusal to promote the plaintiff based on gender.[156] In evaluating Wynn for promotion, the employer was concerned that international clients would not be comfortable making business deals with a female professional.[157] The Ninth Circuit found that the plaintiff was not otherwise qualified for the position, making the plaintiff's prima facie case fail under the *McDonnell Douglas* formulation.[158] In dicta, however, the court assessed the district court's discussion of the employer's alternative defense.[159] The employer argued that sex constituted a BFOQ when the position called for business relations with countries who did not allow women in the workplace.[160] While affirming judgment for the employer, the Ninth Circuit rejected the district court's analysis of the BFOQ defense, stating, "stereotypic impressions of male and female roles do not qualify gender as a BFOQ."[161] The court continued the analysis, asserting, "customer preference based on sexual stereotype cannot justify discriminatory conduct."[162] Therefore, if the court had found the *Fernandez* plaintiff qualified for the job, meeting her

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disparate treatment that must be justified under Title VII as BFOQs. An appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment. A sex-differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment that must be justified as BFOQ.").

[156] Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1274 (9th Cir. 1981).

[157] *Id.* at 1276.

[158] *Id.* at 1275 ("Testimony was presented that Fernandez was not proficient in the English language and had difficulty with articulation. She had no secondary education. Borrello testified that he did not seriously consider Fernandez because she had a drinking problem and erratic work habits. He also testified that she was indiscreet in her criticism of him and in infringing on the job authority of others . . . there was testimony that she had exhibited poor supervisory and marketing skills. Fernandez has therefore failed to demonstrate that the district court erred in failing to find her qualified for the DIO [Director of International Operations] position.").

[159] *Id.* at 1277.

[160] *Id.*

[161] *Id.* at 1276-77.

[162] *Id.* at 1277; *see also* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971).

prima facie case, the employer's BFOQ would have likely failed and the court may have found for the plaintiff.

The *Fernandez* court's discussion of the defendant's invalid BFOQ arguments[163] significantly supports incorporating job-relatedness into the unequal burdens analysis. Harrah's likely rationale for the makeup requirement is to attract customers. This would fail as a BFOQ under the *Fernandez* court's assertion that employers may not rely on customer preference to justify discrimination.[164] Additionally, the appearance policy is grounded in gender stereotypes, which according to *Fernandez* cannot "qualify . . . as a BFOQ."[165] The Ninth Circuit in *Jespersen* never reached that point in the analysis, however, because Jespersen could not meet the burden of proving a tangible disparity.[166] This gap in the court's analysis left Jespersen unprotected from the discrimination inherent in the policy and wholly unrelated to her job description. The court must incorporate a job-relatedness element in the initial weighing of the burdens to assure that appearance polices are not only equally applied but also reasonably related to employment.

Jespersen could have benefited from this kind of analysis. Jespersen presented evidence that she was an exceptional Harrah's employee prior to the implementation of the BDIT/PBIP policies.[167] While Harrah's claimed that the appearance policies created a "brand standard of excellence," it did not implement the BDIT/PBIP policies at all forty casino locations.[168] This inconsistency indicated that the appearance policy and makeup requirement were not necessary to Harrah's business operations. Jespersen had a high customer service rating and maintained her position for close to twenty years.[169] Based on her exceptional work history, Jespersen could successfully complete her job as a bartender without makeup, making it not only a *nonessential* element of job performance, but wholly unrelated to her duties as a bartender.[170] There is no obvious connection between tending bar in a casino and wearing a full face of makeup. According to the court, however, because Jespersen did not provide sufficient evidence of a disparate time requirement or economic burden, Harrah's did not have to

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[163] *Fernandez*, 653 F.2d at 1276-77.

[164] *Id.* at 1277.

[165] *Id.*; *see also Diaz*, 442 F.2d at 389.

[166] *Jespersen II*, 392 F.3d at 1081.

[167] *Id.* at 1076-77.

[168] *Id.*

[169] *Id.*

[170] *Id.* at 1086 (Thomas, J., dissenting).

present *any* reason for imposing the makeup requirement.[171]

Plaintiffs should be allowed to expose disparities, such as lack of a rational relationship to the employee's duties, in their initial case of discrimination. To protect plaintiffs like Jespersen that cannot meet the initial burden with concrete evidence of time and cost, despite a discriminatory policy, the court must look at the entire context of policy, including whether or not the policy has a reasonable purpose for being imposed. In doing so, courts could detect discriminatory employment policies, which may impose "equal" tangible burdens, but are based on gender stereotypes and have little or no relation to the tasks that the employee will perform.

Like focusing on the qualifications of the employee, identifying the connection between an appearance policy and job qualifications is an important issue in initially determining whether a policy is discriminatory. A job-relatedness element would limit arbitrary and discriminatory employment policies. Sex-distinct appearance and grooming policies based on employer discretion must be grounded in reason.[172] Incorporating a job-relatedness element in the initial consideration of disparate burdens would give the court an opportunity to address this objective of Title VII protection.

IV. CONCLUSION

An employer's appearance and grooming policies create the first visual impression a business extends to its customers.[173] While an employer is entitled to choose the features of that impression, such discretion cannot mask acts of employment discrimination. Employment policies such as the Harrah's makeup requirement result in excluding entire protected categories of people from employment. Congress enacted Title VII to protect these people from employment discrimination.[174]

The Ninth Circuit's unequal burdens test does not advance the goals

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[171] *Id.* at 1081.

[172] *Carroll*, 604 F.2d at 1032 ("So long as they find some justification in commonly accepted social norms and are reasonably related to the employer's business needs, such regulations are not necessarily violations of Title VII event though the standards prescribed differ somewhat for men and women.").

[173] *See* Brief of Amici Curiae Council for Employment Law Equity, et al. in Support of Defendant-Appellee, *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076 (9th Cir. 2004) (No. 03-15045), 2003 WL 22340442 ("Employees' appearance and professionalism directly affect an employer's image and reputation. Imposing reasonable dress and grooming standards is a legitimate way for employers to protect their right to manage and maintain their public image.").

[174] *Price Waterhouse*, 490 U.S. at 240.

of Title VII; instead, it permits discrimination through policies based on sex stereotyping.[175] The intended purpose of Title VII is to eliminate employment discrimination based on sex and gender.[176] Therefore, the Ninth Circuit must include gender stereotyping as a factor in its analysis. Moreover, a job-relatedness element would also provide greater protection for employees from arbitrary and discriminatory employment appearance and grooming policies. Finally, the Ninth Circuit should incorporate intangible considerations such as gender stereotyping in the unequal burdens test as well as weigh job-relatedness in the initial evaluation of the plaintiff's case. Such improvements would make the unequal burdens test a more effective method of Title VII protection.

MEGAN KELLY*

[175] *See* Brief of Amici Curiae, *supra* note 125.

[176] *Price Waterhouse,* 490 U.S. at 240-45 ("Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute . . . . We take these words to mean that gender must be irrelevant to employment decisions . . . since we know that the words 'because of' do not mean 'solely because of' we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations.").

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